Kuala Ibai Development Sdn Bhd v Kumpulan Perunding (1988) Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R3–25–13 OF 1998
NIK HASHIM J
16 NOVEMBER 1998

Arbitration *— Arbitrator — Misconduct — Application to set aside award of arbitrator on ground of misconduct — Reasonable suspicion of bias — Whether arbitrator had in fact misconducted himself — Whether the 'reasonable suspicion' test applicable — Arbitration Act 1952 ss 24 & 25*

The first respondent was appointed to provide architectural services in respect of a development project owned by the applicant. A dispute arose and both parties agreed to refer their dispute to arbitration. The Lembaga Arkitek Malaysia then appointed an arbitrator. The applicant applied to set aside the interim award of the arbitrator dismissing the applicant's application for the disqualification and removal of the arbitrator and the incidental award relating to such dismissal on the ground of misconduct under s 24 of the Arbitration Act 1952 ('the Act') and for leave to revoke the authority of the arbitrator to act as the arbitrator on the ground of reasonable suspicion of bias on his part pursuant to s 25 of the Act. The applicant contended that the arbitrator had committed several acts of misconduct, namely: (i) prejudging the issue; (ii) taking into consideration matters which he ought not to consider; (iii) delegation of power and duty; (iv) refusing to grant a proper hearing as to the question of costs; (v) reversing the burden of proof in deciding the quantum of costs payable to the first respondent; and (vi) communicating with counsel for the second respondent by phone without the knowledge of the lawyers of the other party. It was also contended that the arbitrator might not be impartial on the ground of an earlier relationship between him and the architect.

Held, allowing the application:

(1) The meaning of the word 'impartial' in s 25 was not restricted to the 'relationship' of the arbitrator to any other parties to the agreement or 'connection' of the arbitrator to the subject referred. If an arbitrator was not impartial, he should be disqualified and it did not matter whether his lack of impartiality arose out of his relationship or connection with one of the parties or the subject referred. An arbitrator can be or can be perceived to be not impartial arising out of his conduct or his racial prejudice (see p 145H–I).

(2) Although both the 'reasonable suspicion' test and 'real likelihood' test are the law at present, the trend is towards the application of the 'reasonable suspicion' test as this test seems to be broader than the 'real likelihood' test. Applying these principles to the

facts of the present case, a reasonable suspicion or real likelihood of bias on the part of the arbitrator had been made out. The appearance of bias had been established by his conduct. The allegations of the earlier relationship between the arbitrator and the architect may not on their own be sufficient to satisfy the two tests, but the arbitrator's misconduct committed subsequent to his appointment as the arbitrator, seen in the light of his earlier relationship with the architect, irresistibly gave rise to the conclusion that there was a reasonable suspicion or real likelihood of bias by the arbitrator in the proceedings (see p 147A–D).

(3) The opening remarks by the arbitrator tended to give the impression that the arbitrator had prejudged the applicant's application without waiting for the further submission of the applicant. An arbitrator should keep an open mind and not prejudge the issue before hearing fully the arguments of the parties. Prejudging the issue is a misconduct. The arbitrator had therefore misconducted himself (see p 147G–I).

(4) The opening remarks made by the arbitrator were an irrelevant consideration. The arbitrator was more concerned with his image rather than with the issue at hand, ie whether there was any merit in the applicant's application. Thus, by taking into consideration his personal image, the arbitrator had misconducted himself (see p 148A–B).

(5) In the absence of prior consent of the parties, the arbitrator had no authority to engage the independent legal counsel and direct the applicant to bear the cost. The unfair and unauthorized conduct of the arbitrator made the proceedings irregular. This irregularity of action by the arbitrator was not consonant with the principle of equity and good conscience. Further, an arbitrator who is appointed to decide upon a dispute involving questions of law must make his own decision. He cannot transfer it to another and adopt as his own the decision of some legal adviser. In the present case, the arbitrator referred the very issue which formed the subject matter of the applicant's application before him to the independent legal counsel for the opinion. Certainly this must amount to delegation of the arbitrator's power and duty and therefore a misconduct of the proceedings (see p 148F–I).

(6) On the issue of cost, although s 19(1) of the Act gives the arbitrator the discretion 'to direct by whom and in what manner those costs or any part thereof shall be paid ...', nevertheless the discretion must be exercised judiciously in accordance with the law and with the principle of natural justice. In this case, he failed to observe them. In arriving at the decision to award costs to the first respondent without the first respondent justifying them that its claim was reasonable, the arbitrator had reversed the burden of proof and his failure to afford the applicant an opportunity to make submission, thus offending the rule of natural justice, had vitiated the award. Failure to observe the rule of natural justice is

misconduct and therefore fatal to the award. This misconduct could also be perceived that the arbitrator was not to give a fair trial to the parties (see p 149D–F).

(7) With regard to the telephone call, it was highly injudicious and indeed improper for the arbitrator to communicate with the second respondent's counsel without the knowledge and consent of the counsel of the other parties. Viewed in the light of the other misconducts, the court held that the telephone conversation, even though 'one-off', was gross misconduct (see pp 149I and 150A–B).

[**Bahasa Malaysia summary**

Penentang pertama telah dilantik untuk memberi perkhidmatan arkitek berhubung dengan suatu projek pembangunan kepunyaan pemohon. Pertikaian telah timbul dan kedua-dua pihak bersetuju merujuk pertikaian kepada badan timbangtara. Lembaga Arkitek Malaysia kemudiannya melantik seorang penimbangtara. Pemohon memohon untuk mengetepikan award interim penimbangtara yang menolak permohonan pemohon untuk penyingkiran penimbangtara dan award sampingan berkaitan dengan pemecatan sedemikian atas alasan salah laku di bawah s 24 Akta Timbangtara 1952 ('Akta tersebut') dan untuk kebenaran membatalkan kuasa penimbangtara untuk bertindak sebagai penimbangtara atas alasan rasa syak sikap berat sebelah yang munasabah pada pihaknya menurut s 25 Akta tersebut. Pemohon berhujah bahawa penimbangtara telah melakukan pelbagai perbuatan salah laku, iaitu: (i) membuat pengadilan terlebih dahulu mengenai isu; (ii) mengambil kira hal-hal yang tidak harus dipertimbangkan; (iii) penugasan kuasa dan kewajipan; (iv) keengganan memberikan pembicaraan yang wajar mengenai persoalan kos; (v) mengakas beban membukti dalam memutuskan kuantum kos yang harus dibayar kepada penentang pertama; dan (vi) berhubung dengan peguam penentang kedua menerusi telefon tanpa pengetahuan peguam untuk pihak yang lain. Ia juga dihujahkan bahawa penimbangtara mungkin tidak bersikap adil atas alasan wujudnya perhubungan yang lebih awal di antara dirinya dan arkitek tersebut.

Diputuskan, membenarkan permohonan:

(1) Makna perkataan 'impartial' dalam s 25 tidak terbatas kepada 'hubungan' penimbangtara kepada mana-mana pihak lain persetujuan tersebut atau 'kaitan' timbangtara kepada perkara yang dirujuk. Andainya seseorang penimbangtara tidak bersikap adil, beliau patut disingkir dan ia tidak penting sama ada ketiadaan sikap adil timbul daripada hubungan atau kaitan dengan salah satu daripada pihak terlibat atau perkara yang dirujuk. Seseorang penimbangtara boleh bersikap adil atau boleh dianggap tidak bersikap adil daripada kelakuan atau daripada prasangka ras (lihat ms 145H–I).

(2) Walaupun kedua-dua ujian 'reasonable suspicion' dan 'real likelihood' merupakan undang-undang yang berkuatkuasa, terdapat arah aliran yang cenderung kepada pemakaian ujian 'reasonable suspicion' kerana ujian ini adalah lebih luas daripada ujian 'real likelihood'. Dengan memakai prinsip-prinsip ini kepada fakta-fakta kes, rasa syak yang munasabah atau kebarangkalian sikap berat sebelah pada pihak penimbangtara telah terbukti. Kemunculan sikap berat sebelah telah dibuktikan oleh tingkah lakunya. Tohmahan tentang hubungan yang lebih awal di antara penimbangtara dan arkitek tidak mungkin dengan sendirinya mencukupi bagi memenuhi dua ujian itu, tetapi salah laku penimbangtara yang terjadi selepas pelantikannya sebagai penimbangtara, dilihat dari segi hubungannya yang lebih awal dengan arkitek tersebut, menimbulkan kesimpulan yang tidak dapat dielakkan bahawa wujudnya rasa syak yang munasabah atau kebarangkalian sikap berat sebelah oleh penimbangtara dalam prosiding tersebut (lihat ms 147A–D).

(3) Kata-kata pembukaan oleh penimbangtara seakan-akan memberi tanggapan bahawa penimbangtara telah membuat pengadilan terlebih dahulu mengenai permohonan pemohon tanpa menunggu penghujahan lanjut dari pemohon. Seseorang penimbangtara harus bersikap terbuka dan tidak membuat pengadilan isu terlebih dahulu sebelum mendengar penghujahan pihak-pihak sepenuhnya. Pengadilan isu terlebih dahulu merupakan salah laku. Maka penimbangtara telah salah laku dirinya (lihat ms 147G–I).

(4) Kata-kata pembukaan oleh penimbangtara adalah pertimbangan yang tidak relevan. Penimbangtara lebih mengambil berat tentang imejnya daripada isu berkenaan, iaitu sama ada terdapat apa-apa merit dalam permohonan pemohon. Justeru itu, dengan mengambil kira imej peribadinya, penimbangtara telah salah laku (lihat ms 148A–B).

(5) Dalam ketiadaan persetujuan pihak-pihak, penimbangtara tidak berkuasa untuk mengambil peguam bebas dan mengarah pemohon menanggung kos. Kelakuan penimbangtara yang tidak adil dan tidak diberikuasa menyebabkan prosiding menjadi luar aturan. Perbuatan penimbangtara yang merupakan luar aturan tidak mematuhi prinsip ekuiti dan dengan kemurnian. Seterusnya, penimbangtara yang dilantik untuk membuat keputusan atas pertikaian yang melibatkan persoalan undang-undang mesti membuat keputusan sendiri. Beliau tidak boleh memindahkannya kepada penimbangtara lain dan menerimapakai keputusan penasihat undang-undang sebagai keputusannya sendiri. Dalam kes ini, penimbangtara telah merujuk isu yang membentuk hal perkara pemohon di depannya kepada peguam bebas untuk pendapat. Sudah tentu ini merupakan penugasan kuasa dan kewajipan penimbangtara dan oleh yang demikian salah laku prosiding tersebut (lihat ms 148F–I).

(6) Mengenai isu kos, walaupun s 19(1) Akta tersebut memberikan penimbangtara budi bicara 'to direct by whom and in what manner those costs or any part thereof shall be paid ...', namun demikian budi bicara mestilah dilaksanakan secara bijak menurut undang-undang dan prinsip keadilan asasi. Dalam kes ini, beliau telah gagal mematuhinya. Dalam mencapai keputusan untuk mengawardkan kos kepada penentang pertama tanpa penentang pertama memberi justifikasi bahawa tuntutannya adalah munasabah, penimbangtara telah mengakas beban membukti dan kegagalannya untuk memberi peluang kepada pemohon untuk membuat penghujahan, justeru itu melanggar rukun keadilan asasi, telah menjadikan award tersebut tak sah. Kegagalan untuk mematuhi rukun keadilan asasi adalah salah laku dan maka padah kepada award tersebut. Salah laku ini juga boleh dianggap bahawa penimbangtara tidak harus memberi pembicaraan yang adil kepada pihak-pihak terlibat (lihat ms 149D–F).

(7) Berkaitan dengan panggilan telefon itu, adalah kurang bijak dan memang tidak elok untuk penimbangtara berhubung dengan peguam penentang kedua tanpa pengetahuan dan persetujuan peguam bagi pihak-pihak lain. Memandangkan salah laku lain, mahkamah memutuskan bahawa perbualan telefon itu, walaupun sekali sahaja, adalah salah laku melampau (lihat ms 149I dan 150A–B).]

Notes

For a case on misconduct of an arbitrator, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) para 724.

Cases referred to

AC Ho Sdn Bhd v Ng Kee Seng (t/a Konsultan Senicipta) [1998] 2 MLJ 393 (refd)

Catalina SS Owners v Norma Owners [1938] 61 LI L Rep 360 (refd)

Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1955] 2 MLJ 213 (refd)

Progressive Insurance Sdn Bhd v Gaya Underwriting Services Sdn Bhd [1997] 3 MLJ 524 (refd)

R v Sussex Justices, ex p McCarthy [1924] 1 KB 256 (refd)

Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (refd)

Szilard v Szazz [1955] SCR 3 (refd)

Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd & Anor (No 2) [1988] 2 MLJ 502 (refd)

Legislation referred to

Arbitration Act 1952 ss 19(1), 22, 24, 25

Chia Loong Thye (*Lee Hishamuddin*) for the applicant.
Felix Dorairaj (*Dorairaj Low & Teh*) for the first respondent.
Wong Sow Wei (*Navaratnam & Co*) for the second respondent.

Nik Hashim J:

The application

This is an application by way of an originating motion to set aside the interim award of the learned arbitrator, En Ng Chee Keong, dated 8 January 1998, dismissing the applicant's application for the disqualification and removal of the arbitrator and the incidental award relating to such dismissal on the ground of misconduct under s 24 of the Arbitration Act 1952 ('the Act') and for leave to revoke the authority of the arbitrator to act as the arbitrator on the ground of reasonable suspicion of bias on his part pursuant to s 25 of the Act. All references in this judgment to provisions of law shall be to sections of the Act.

The facts

The Kumpulan Perunding (1988) Sdn Bhd ('the first respondent') was appointed to provide architectural services in respect of a development called Ibai Golf and Country Resort Development, Mukim Kuala Ibai and Mukim Bukit Besar, Terengganu ('the project'). The architect who was principally involved in the project is Dato' Maurice Wee Beng Teck ('the architect'), who is the principal partner in the first respondent company.

The project was initially owned by Ibai Bina Sdn Bhd ('the second respondent') and was subsequently taken over by Kuala Ibai Development Sdn Bhd ('the applicant'). The first respondent was aware of this change of ownership.

A dispute arose in respect of the architectural services provided by the first respondent to the applicant and both parties agreed to mutually terminate the service of the first respondent and to refer their dispute to arbitration. The first respondent is contending that it has been and still appointed by the second respondent, the original owner of the project. At the request of the first respondent, the Lembaga Arkitek Malaysia ('the LAM'), who is the appointing authority for the arbitration, added the second respondent as the co-respondent in the said arbitration. Hence the presence of the second respondent. In response to the notice of arbitration, the LAM appointed En Ng Chee Keong as the arbitrator to arbitrate on the dispute between the applicant and the first respondent.

The applicant took objection to the appointment of the arbitrator as the arbitrator on the grounds of a reasonable suspicion of bias and has requested the arbitrator to disqualify himself as the arbitrator in the arbitration. A series of letters and correspondence were exchanged between the applicant, the arbitrator and the first respondent in respect of this issue.

The findings of the arbitrator on the application for disqualification

The applicant's and the second respondent's application before the arbitrator for the disqualification and removal of the arbitrator on the ground of bias or likelihood of bias, was rejected by the arbitrator for the following reasons:

(i) the grounds as cited in the applicant's submission, does not go towards establishing a case of bias or a likelihood of bias;

(ii) there is no bias or likelihood of bias on the arbitrator's part and there is no element of personal involvement by the arbitrator with the subject matter of the dispute at hand nor with any of the parties in the sense as highlighted in the facts of the several cases referred to in the submissions and replies of counsel;

(iii) the facts of those cases referred to are totally different and distinguishable from the facts of the matter here, the authorities referred to are therefore not relevant nor applicable to the facts of this matter in this arbitration; and

(iv) there is no linkage between the arbitrator and the subject matter nor with the parties as is seen in the cases referred to.

(Pages 3 and 4 of the interim award.)

As a result of the rejection of the application for disqualification, the arbitrator made the following award at p 5 of the interim award:

2(i) That the first (second respondent) and second respondents (applicant) shall pay the claimant's (first respondent's) costs in so far as it relates to the respondents' (second respondent's and applicant's) application for disqualification and removal of the arbitrator on grounds of bias or likelihood of bias, in the proportions as follows:

first respondent (second respondent) to pay 25%; and

second respondent (applicant) to pay 75%.

(ii) The claimant's (first respondent's) costs shall be inclusive of 5% service tax if applicable and shall be paid within four (4) weeks of receipt of claimant's (first respondent's) statement of costs.

3(i) The costs of this award, in so as it relates to the respondents' (second respondent's and the applicant's) application for disqualification and removal is taxed and settled at Ringgit Malaysia twelve thousand and seventy-five only (RM12,075).

(ii) The said costs of RM12,075 shall be paid by the first and second respondents (second respondent and applicant respectively) in proportions as follows:

first respondent (second respondent) to pay RM3,018.75; and

second respondent (applicant) to pay RM9,056.25.

(iii) The first and second respondents (second respondent and applicant respectively) shall pay the amounts of RM3,018.75 and RM9,056.25 respectively to the arbitrator within two (2) weeks of date of this award.

Hence the application before me.

The contentions of the applicant

It is the contention of En Chia Loong Thye, learned counsel for the applicant, that the arbitrator has committed several acts of misconduct, namely:

(a) prejudging the issue;

(b) taking into consideration matters which he ought not to consider;

(c) delegation of power and duty;

(d) refusing to grant a proper hearing as to the question of costs;

(e) reversing the burden of proof in deciding the quantum of costs payable to the first respondent; and

(f) communicating with the counsel for the second respondent by phone without the knowledge of the lawyers of the other party.

Thus, such conduct of the arbitrator warrants his removal and setting aside the interim award under s 24 of the Act. As for the application to revoke the authority of the arbitrator under s 25, the applicant is saying that the arbitrator may not be impartial on the grounds that:

(a) the claimant (the first respondent) in the arbitration proceeding is Kumpulan Perunding (1988) Sdn Bhd. However, the architect involved in the project is Dato' Maurice Wee Beng Teck (the architect). The architect studied architecture in the University of Newcastle, New South Wales, Australia from 1965 to 1969 and graduating in 1970, with Bachelor of Architecture;

(b) the arbitrator also studied architecture in the same university as the architect from 1966 to 1970 and graduating in 1971 with Bachelor of Architecture;

(c) the Arbitrator had various periods in 1966, 1967 and 1968 been a lodger at the Newcastle YMCA Hostel. The architect was also a lodger at the hostel at various periods during that period of time;

(d) the architect and the arbitrator have common friends although by and large, they had their own circle of friends; and

(e) both the architect and the arbitrator are members of the Royal Australian Institute of Architecture and Malaysian Institute of Interior Designers.

Counsel for the applicant urged the court to hold, on the 'reasonable suspicion' test, that the arbitrator, based on his conduct subsequent to his appointment, may not be impartial in the arbitration proceedings, and therefore prays that the authority of the arbitrator be revoked.

The contentions of the first respondent

Encik Felix Dorairaj, learned counsel for the first respondent argued that the allegations contained in para 10(a) to (e) above are sufficiently remote, and therefore cannot satisfy s 25 and the 'reasonable man' and the 'real likelihood' test. With regard to the alleged misconduct by the arbitrator in para 9(a) to (f) above, counsel submitted that the arbitrator is not guilty of misconduct and urged the court to adopt a benevolent attitude to the interpretation of arbitral awards and particularly to those made by commercial men and the court must not be overready to set aside awards where parties have agreed to abide by the decision of tribunal of their own

A selection, unless there has been something radically wrong and vicious in the proceedings and cited *AC Ho Sdn Bhd v Ng Kee Seng (t/a Konsultant Senicipta)* [1998] 2 MLJ 393 in support.

The contentions of the second respondent

B Encik Wong Sow Wei, learned counsel for the second respondent, however supported the application by adopting the submission of the applicant. According to him, the second respondent has been aggrieved by the arbitrator's award and asked the court to allow the application with costs to be borne by the first respondent.

C *The law*

Sections 24 and 25 of the Act

The power of removal of arbitrator and setting aside of arbitrator's award is provided under s 24:

D

(1) Where an arbitrator or umpire has misconducted himself or the proceedings, the High Court may remove him.

(2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.

E The above provisions are self-explanatory.

The power of the High Court to give relief for leave to revoke the authority of the arbitrator where an arbitrator is not impartial is provided under s 25(1) which states:

F

> Where an agreement between and parties provides that disputes which may arise in the future between them shall be referred to an arbitrator named or designated in the agreement and, after a dispute has arisen, any party applies, on the ground that the arbitrator so named or designated is not or may not be impartial, for leave to revoke the authority of the arbitrator or for an injunction to restrain any other party or the arbitrator from proceeding with the arbitration, it shall not be a ground for refusing the application that the said party at the time when he made the agreement knew or ought to have known, that the arbitrator, by reason of his relation towards any other party to the agreement or of his connection with the subject referred, might not be capable of impartiality.

G

From the reading of the section, I find that the meaning of the word H 'impartial' in s 25(1) is not restricted to the 'relationship' of the arbitrator to any other parties to the agreement or 'connection' of the arbitrator to the subject referred. To my mind, if an arbitrator is not impartial he should be disqualified and it does not matter whether his lack of impartiality arose out of his relationship or connection with one of the parties or the subject referred. An arbitrator can be or perceived to be not impartial arising out of I his conduct (as in *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd & Anor (No 2)* [1988] 2 MLJ 502) or arising out of his racial prejudice (as in *Catalina SS Owners v Norma Owners* [1938] 61 LI L Rep 360).

Raja Azlan Shah J (as his Highness then was) in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 explained the word 'misconduct' at p 211 at para F (right):

> ... In the law of arbitration misconduct is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes any irregularity of action which is not consonant with the general principles of equity and good conscience. These illustrations are not meant to be exhaustive. But failure to analyse and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated.

On the issue of bias against a judge, NH Chan JCA in *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1955] 2 MLJ 213 at p 223 observed:

> Other than an interest which is pecuniary or proprietary in the subject matter of the proceeding, the law does not assume bias so as to disqualify a judge from acting in his judicial capacity.

At p 226, the learned judge said:

> ... There must be circumstances which would lead a reasonable and fair-minded person sitting in court to have reasonable ground to suspect that the judge would appear to be biased .... The proper test on the appearance of bias is whether a reasonable and fair-minded person sitting in court and knowing all the relevant facts would have ground to suspect that a fair trial would not be possible.

He then continued at p 228 and stated:

> ... To disqualify a judge, there must be circumstances or facts which have been shown to exist which would lead a reasonable and fair-minded onlooker or which would have given reasonable ground for him to suspect that the case would not be decided according to the evidence.

It would appear from the above passage that the learned judge of the Court of Appeal is inclined more towards the 'reasonable suspicion' test rather than the 'real likelihood' test. Although *Hock Hua Bank* has reference to a judge, the position of law enunciated by the Court of Appeal, in my view, is also applicable to an arbitrator.

However, in *Progressive Insurance Sdn Bhd v Gaya Underwriting Services Sdn Bhd* [1997] 3 MLJ 524, where it was alleged that the arbitrator had a personal interest in the subject matter of the suit which disqualified him from acting, the Court of Appeal (comprising NH Chan, Mahadev Shanker and Ahmad Fairuz JJCA) held that (at p 525):

> ... *A real likelihood of bias* must be shown not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries. (Emphasis added.)

The findings of the court

For my part, I accept both the tests as being the law at present, though the trend is towards the application of the 'reasonable suspicion' test, as in essence, the 'reasonable suspicion' test seems to be somewhat broader than the 'real likelihood' test (see Prof MP Jain in his book, *Administrative Law of Malaysia and Singapore* (2nd Ed) 1989 at p 207).

Therefore, applying the above principles to the facts of the present case, I am satisfied that a reasonable suspicion or real likelihood of bias on the part of the arbitrator has been made out. The appearance of bias has been established by his conduct. The arbitrator has committed the acts of misconduct complained of subsequent to his appointment as the arbitrator, and such misconducts, to my mind, are sufficient to remove him as the arbitrator. The allegations of the 'earlier relationship' between the arbitrator and the architect as listed under para 10(a) to (f) above may not on their own be sufficient to satisfy the two tests, but the arbitrator's misconduct committed subsequent to his appointment as the arbitrator, seen in the light of his earlier relationship with the architect, irresistably gives rise to the conclusion that there is a reasonable suspicion or real likelihood of bias by the arbitrator in the proceedings. That conclusion is based on the following acts of misconduct by the arbitrator.

(a)Prejudging the issue

At the first preliminary meeting of the arbitration on 17 November 1997, the arbitrator made an opening remark. In response to the request by the applicant for an adjournment of the arbitration to study the facts stated by the arbitrator in his letter of 14 November 1997 and to make submission on whether the arbitrator should disqualify himself as the arbitrator, he inter alia, said (which is not disputed) to the effect that with the facts that he has revealed as to the relationship between himself and the architect, there is no ground for him to disqualify himself or to withdraw himself as the arbitrator, and that as the President of the Malaysian Institute of Arbitrators, he has to set good examples to the members and should not be showing bias, and, if he should decide to withdraw now on the grounds advanced by the applicant, it would look badly on him since he has already accepted the appointment as the arbitrator. In my view, the remarks tend to give the impression that the arbitrator has prejudged the applicant's application without waiting for the further submission of the applicant, notwithstanding that the arbitrator has said that he will keep an open mind. It does not matter whether the remarks of the arbitrator was made before or after the submission. What is important is that an arbitrator should keep an open mind and not to prejudge the issue before hearing fully the arguments of the parties. Prejudging the issue is a misconduct. The arbitrator has therefore misconducted himself. In *Turner*, at p 515F–G, the arbitrator prematurely gave his views on the Legal Profession Act issue though he did qualify himself by saying that 'I have in no way closed my mind on this subject.' The learned judicial commissioner in that case held that it could be construed that the arbitrator was not to give equal consideration to the arguments of the parties. The arbitrator was removed.

(b)Taking into consideration matters which he ought not to take

The opening remarks made by the arbitrator is an irrelevant consideration. It gave the impression that the arbitrator is taking into consideration factor which he ought not to have taken into consideration. The arbitrator is more concerned with his image rather than attend to the issue at hand, ie whether there are any merits in the applicant's application. Thus, by taking into consideration his personal image, the arbitrator has misconducted himself.

(c)Delegation of power and duty

In the course of the arbitration proceedings the arbitrator obtained an independent legal opinion in respect of the application to disqualify the arbitrator. In exh YSS–15, the arbitrator states:

> I have considered at great length the submission of the second respondent (applicant), the claimant's (first respondent's) reply to the submission and the respondent's (applicant's) reply to the claimant's (first respondent's) reply, I have also obtained an independent legal opinion on this matter of bias or likelihood of bias, and it is clear to me that the grounds as cited by the second respondent (applicant), items (a) to (e) of the second respondent's (applicant's) submissions, does not go towards establishing a case of bias or a likelihood of bias, the independent legal opinion obtained has fortified my view.

It is to be noted that this legal opinion was obtained without the knowledge and consent of the applicant. Further, the arbitrator has incurred costs in seeking the opinion of the independent legal counsel and the arbitrator has directed in his interim award that the applicant and the second respondent shall be liable for this cost. I hold this is unfair to both the applicant and the second respondent. In the absence of prior consent of the parties, the arbitrator has no authority to engage the independent legal counsel and direct the applicant and the second respondent to bear the cost. The unfair and unauthorized conduct of the arbitrator makes the proceedings irregular. This irregularity of action by the arbitrator is not consonant with the general principle of equity and good conscience (see *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210).

An arbitrator who is appointed to decide upon dispute involving questions of law must make his own decision. He cannot transfer it to another, and adopt as his own decision of some legal adviser. If he cannot proceed without instruction as to the law, he should state a case to the court or (if the parties prefer it, as they do sometimes) for the opinion of counsel (see *Russell on the Law of Arbitration* (8th Ed) 1970 pp 192 and 196).

In the present case, the arbitrator referred the very issue which forms the subject matter of the applicant's application before him to the independent legal counsel for the opinion. Certainly, this amounts to a delegation of the arbitrator's power and duty, and therefore, a misconduct of the proceedings. If the arbitrator is not confident in his ability to decide the issue of the applicant's application, he could have resorted to the provision of s 22 in the form of a special case for the decision of the High Court. This he never did.

(d)Refusing to grant a proper hearing as to the question of costs and reversing the burden of proof in deciding the quantum of costs payable to the first respondent

After the interim award was made the applicant and the second respondent took objection to the manner in which the arbitrator has dealt with the question of costs payable to the first respondent as a result of the arbitrator dismissing the applicant's application before the arbitration. Briefly, the applicant's complaints are that:

(i) the arbitrator's exercise of his discretion in directing that the costs of the first respondent be paid forthwith; and

(ii) the arbitrator in arriving at the decision to award costs of RM23,650 to the first respondent, reversed the burden of proof.

On the issue of costs, though s 19(1) gives the arbitrator the discretion 'to direct and by whom and in what manner those costs or any part thereof shall be paid ...' nevertheless, the discretion must be exercised judiciously, in accordance with the law and with the principle of natural justice. In this case, he failed to observe them. The arbitrator directed the costs of the first respondent to be paid forthwith without a request by the first respondent and without affording the applicant and the second respondent an opportunity to respond to the views and comments of the first respondent's letter dated 8 April 1998. Moreover, there is no exceptional circumstances shown to the arbitrator to warrant the costs to be paid forthwith (see *The Law and Practice of Commercial Arbitration in England* by Sir Michael Mustill 1982 at p 354). In arriving at the decision to award the costs of RM23,650 to the first respondent, without the first respondent justifying them that its claim was reasonable, the arbitrator has reversed the burden of proof, and his failure to afford the applicant and the second respondent an opportunity to make submission and thus offending the rule of natural justice, has vitiated the award. Failure to observe the rule of natural justice is misconduct and therefore, fatal to the award. This misconduct could also be perceived that the arbitrator was not to give a fair trial to the parties.

(e)Communicating with the counsel for the second respondent by phone without the knowledge of the other counsel

This incident happened on 3 April 1998 when the arbitrator telephoned the counsel for the second respondent and requested the counsel to state the ground of his objections more clearly to the question of costs. This telephone call was made after the arbitrator has already issued a written directive dated 27 March 1998 to all parties to submit to him by 6 April 1998 (exh YSS–1–H — encl 7). With regard to the telephone call, it is highly injudicious and indeed improper for the arbitrator to communicate with the second respondent's counsel without the knowledge and consent of the counsel for the other parties. It is irrelevant whether the first respondent objected to such communication or not. The applicant and the second respondent are two separate legal entities and are named separately in the arbitration proceedings. Therefore, the arbitrator ought not to have communicated with one party to the proceedings only. Viewed in the light

of the other misconducts, I, with great respect to the learned arbitrator, hold that this telephone conversation, even though 'one-off', is gross misconduct. Thus, the arbitrator has misconducted himself and the proceedings. The conduct could be construed that the learned arbitrator was not to give equal consideration to the arguments of the parties.

The conclusion

It is worthy to note that parties to the arbitration are entitled to expect from an arbitrator complete impartiality and indifference, both as between themselves and with regard to the matters left to the arbitrator to decide. They are also entitled to expect from him a faithful, honest and disinterested decision. Lack of impartiality or bias will be a ground on which objection may be taken against an arbitrator (see *Szilard v Szazz* [1955] SCR 3). The arbitrator must not only be free from bias, but there must not be even an appearance of bias.

There can be no doubt that an arbitrator must always act judicially with a detached mind and with patience. He must not at any time descend into the arena or take an adversarial role. His response and words used must always be measured and circumspect (per Chao Hick Tin JC in *Turner* at p 514 para E). He must rule only after hearing the parties. He should always maintain the dignity and impartiality of the appointment. This the learned arbitrator in this case has failed to do.

An arbitrator, once appointed, must take note that his duty is to dispense justice according to law to the best of his ability, and he must always be conscious of Lord Hewart's reminder in *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256 at p 259, that 'justice should not only be done but should manifestly and undoubtedly be seen to be done'.

In the present case, it has been amply established that the arbitrator has not only misconducted himself but also the proceeding itself. He has shown bias in the proceedings. The misconducts committed by the arbitrator have made the proceedings radically wrong and vacious (see *AC Ho Sdn Bhd*).

In the event, and with much regret, I have to order the interim award of the learned arbitrator dated 8 January 1998 be set aside and grant leave to revoke the authority of En Ng Chee Keong as the arbitrator as per terms prayed in the notis usul pemula under reliefs (a) and (b) respectively. I also order that the cost of this application and the interim award of 8 January 1998 of the arbitrator be taxed and borne by the first respondent. I order that no costs be awarded against the second respondent.

Application allowed.

Reported by Jafisah Jaafar